

October 24, 2013

## **Tax Guidance for Individuals in a Same-Sex Marriage**

### **Issue**

May individuals in a same-sex marriage, which is recognized for purposes of federal income tax filing status, file their Nebraska individual income tax returns using a married, filing jointly or married, filing separately filing status, or will they be required to file the return under a single or, if qualified, head of household status?

### **Conclusion**

The Nebraska Constitution does not recognize same-sex marriages. Individuals in a same-sex marriage must file their Nebraska individual income tax returns separately using the single or, if qualified, head of household filing status.

### **Analysis**

#### **Federal Tax Treatment**

[IRS Rev. Rul. 2013-17](#) provides that a same-sex marriage that was validly entered into in a jurisdiction whose laws authorize a same-sex marriage will be recognized for federal income tax purposes, even if the individuals are domiciled in a state whose laws do not recognize same-sex marriage.

For tax years 2013 and after, the IRS ruling states that same-sex married couples must file their federal income tax returns using a married, filing jointly or married, filing separately filing status. Additionally, same-sex married couples who file an original federal income tax return on or after September 16, 2013, for a tax year prior to 2013, must file their returns using a married, filing jointly or married, filing separately filing status.

For tax year 2012, same-sex married couples who filed their original federal income tax returns before September 16, 2013, may choose, but are not required, to amend their federal returns to change their filing status to married, filing jointly or married, filing separately, in which case all items required to be reported on the return must be adjusted to be consistent with the new married filing status.

For tax years before 2012, same-sex married couples who timely filed their federal income tax returns may choose, but are not required, to amend their federal returns to change their filing status to married, filing jointly or married, filing separately if the time period for filing an amended return for the tax year has not expired.

#### **Nebraska Tax Treatment**

While IRS Rev. Rul. 2013-17 requires individuals in a same-sex marriage to file their federal tax returns using a married, filing jointly or married, filing separately filing status, Nebraska does not recognize same-sex marriages. [Neb. Const. art. I, § 29](#) states:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

[Neb. Rev. Stat. § 77-2732](#) (Reissue 2009) provides that “if the federal tax liability of husband and wife is determined on a joint federal return, their tax liability shall be determined in this state jointly and their tax liability shall be joint and several.” The Nebraska Supreme Court has also held that: “Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.” *State ex. rel. Meyer v. Lancaster County*, 173 Neb. 195, 200, 113 N.W.2d 63, 67 (1962). In accordance with *Meyer*, the Nebraska Department of Revenue construes “husband and wife” to mean one man and one woman who are married to each other, in accordance with Neb. Const. art. I, § 29.

Pursuant to Neb. Const. art. I, § 29, individuals who entered into a same-sex marriage in a jurisdiction that recognizes same-sex marriages cannot file a Nebraska individual income tax return using either a married, filing jointly or married, filing separately filing status. The following rules apply to same-sex individuals who are considered married for federal tax purposes:

- Each individual must file a separate Nebraska income tax return using Form 1040N;
- Each individual must use a single or, if qualified, head of household filing status; and
- Each individual must use the tax rates corresponding to the single or head of household filing status, whichever applies.

The above guidance applies to 2012 returns filed on or after September 16, 2013; late returns from prior years filed on or after September 16, 2013; and returns filed for tax years 2013 and beyond. Although amended returns may be filed for federal tax purposes to change the filing status to married, filing jointly or married, filing separately, no amended returns may be filed in Nebraska by individuals in a same-sex marriage to change the filing status in a like manner.

Specific guidance on how to file Nebraska individual income tax returns for individuals in same-sex marriages will be issued in the near future, and will be included in the instructions for the 2013 Nebraska Individual Income Tax Return, Form 1040N.

APPROVED:



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Tax Commissioner

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